PRIVACY AND POLICE INVESTIGATIONS: *ZXC v BLOOMBERG*

THE Court of Appeal's conclusion in *ZXC v Bloomberg* [2020] EWCA Civ 611 that people have a reasonable expectation of privacy in respect of the fact and details of a police investigation into their conduct raises important questions about both the scope of the misuse of private information tort and its relationship with defamation and breach of confidence.

In *ZXC*, Bloomberg (a well-known media organisation) had published an article about the investigations of a UK law enforcement body (the UKLEB) into a company chief executive's alleged involvement in corruption in a foreign state. That article was based on information contained in a highly confidential letter of request sent by the UKLEB to that state (although it is not clear from the judgments how Bloomberg obtained it). The Court of Appeal upheld Nicklin J.'s decision in the court below that ZXC had a reasonable expectation of privacy in respect of both the fact that the UKLEB had requested the information about him and the details of the matters it was investigating. That expectation was held not to be outweighed by Bloomberg's countervailing right to publish information which is in the public interest. Bloomberg did not challenge Nicklin J.'s award of an injunction requiring the article to be removed from the Internet nor his award of £25,000 for the distress and anger caused by its publication.

In the Court of Appeal, Simon L.J. (with whom Underhill and Bean L.JJ. concurred) said that the court would only interfere with the conclusions of the judge below if he had made an error of law. He said there was no such error, rejecting all of the defendant's grounds of appeal including arguments that the judge had placed undue weight on the confidentiality of the letter of request (as opposed to the respondent's expectations of privacy in respect of it) (at [90]–[93]) and that it was artificial to distinguish between publication of factual allegations of criminal conduct and information about a police investigation in respect of them (at [94]–[96]). Most significantly, Simon L.J. rejected the claim that the judge had been wrong in law to conclude that in general a person has a reasonable expectation of privacy in a police investigation up to the point of charge. Rather, he held that:

> those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion. The suspicion might ultimately be shown to be well-founded or ill-founded, but until that point the law should recognise the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty (at [82]).

This emphasis on the stigma associated with police investigations echoes the focus of both Nicklin J.'s judgment and the earlier police investigation cases (see eg *Richard v BBC* [2018] EWHC 1837 (Ch)).

Simon L.J. makes it clear, however, that the general rule that there is a reasonable expectation of privacy in respect of state investigations is merely a starting point which can be overridden if the circumstances of the case require it (at [81], see also [150] (Underhill L.J.)). The "preliminary and contingent nature of the investigation" is also central to the rule's applicability; it only applies up to the point of charge (not until guilt or innocence is actually established) (at [2], [78]–[85]). The rule also only applies to information about state investigations into a person's conduct; it does not apply to information about the alleged wrongdoing which is being investigated. There is plainly a difference, Simon L.J. said, "between a report about the alleged criminal conduct of an individual and a report about a police investigation into the individual and preliminary conclusions drawn from those investigations" (at [96] (and [71])). So Bloomberg's publication was wrongful because it disclosed details of the UKLEB's investigation obtained from a confidential UKLEB document; it would not have been wrongful (at least not for breach of privacy) if Bloomberg had merely published the details of the alleged wrongdoing itself. This leaves largely intact the emerging principle that the privacy action should not avail those seeking to suppress information about their own serious wrongdoing. It is notable, however, that because the court did not distinguish between situations where the defendant has obtained information about an investigation from the police themselves and those where it was obtained it from an independent third party, a victim could face liability for telling others that the police were investigating his or her own allegations.

The decision also has significant ramifications for the law of defamation. As the court's focus on the stigma associated with police investigations makes clear, the appellant in *ZXC* was using the privacy action to protect his reputation. He was entitled to keep information about the investigation to himself, the court held, not because it relates to an intimate aspect of his life like health, sex life or intimate relationships, but because it would make some people think that he was guilty when he might not be. This not only disrupts the traditional focus of the law of privacy, it strays into territory traditionally covered by the law of defamation – and strikes the balance between free speech and reputation in a different place. It is a fundamental principle of defamation, for example, that a defendant should not be compensated for loss of a reputation which he or she might not deserve. Yet in *ZXC*, the respondent was found to have a reasonable expectation of privacy because of the detrimental effect of publication on his reputation even though Bloomberg had no opportunity to establish that the underlying allegations were true. This created the very risk that the defamation principle is designed to avoid, namely that the respondent was using the law to protect a

good reputation which he did not in fact deserve (a point Nicklin J. relied on when declining to award damages for loss of reputation at first instance, see *ZXC v Bloomberg* [2019] EWHC 970 (Q.B.) at [149]–[152]). It also has the potential to disrupt the long-standing rule in *Bonnard v Perryman* [1891] 2 Ch. 269 that interim injunctions should not be awarded for defamation if the defendant intends to justify the disclosure at trial. If a true but damaging disclosure can be protected by a pre-trial injunction for misuse of private information, that rule can be readily circumvented.

Questions can also be asked about how *ZXC* fits with the Supreme Court's conclusion in *Flood v Times Newspapers Ltd.* [2012] UKSC 11 and *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44 that there is sufficient public interest in articles identifying named individuals as the subject of state investigation for police corruption and funding terrorism, respectively (and in the case of *Flood*, describing the allegations in detail) for the *Reynolds* public interest defence to apply (if the respondents can satisfy the other requirements of responsible publication). In *Flood*, this was the case even though the allegations against the claimant had been found to be false. Whilst *Flood* and *Jameel* might be distinguishable on their facts, the central point that there is a public interest in the disclosure of information about state investigations is potentially undermined by the conclusion in *ZXC* that such information is generally private. Why would claimants rely on defamation to protect themselves against the stigma associated with police investigation if they can sidestep that action's free-speech protections by suing in misuse of private information instead (and avoid unwelcome questions about the truth of the underlying allegations to boot)? Regrettably, none of these issues was discussed in the Court of Appeal decision in *ZXC*.

Some of this tension between privacy and defamation might have been avoided if the court had homed in more expressly on the issue at the heart of the state investigation cases, namely the relationship between the citizen and the state when the latter has the former under investigation. The real issue in *ZXC* is arguably not that the appellant published the respondent's private information but that information obtained by an investigatory authority with significant power over him ended up in the hands of the media. Breach of confidence provides useful guidance on how this issue might have been addressed. In *R (on the application of Ingenious Media Holdings Ltd.) v Commissioners for HMRC* [2016] USKC 54, the Supreme Court held that information of a personal or confidential nature obtained or received in "the exercise of a legal power or in furtherance of a public duty" will attract a duty "to the person from whom it was received or to whom it relates not to use it for other purposes" (at [17]). Whether it was adapted for misuse of private information or applied directly in breach of confidence, this principle would provide a more targeted (and less potentially disruptive) basis for liability than a general rule that a

person has a reasonable expectation of privacy in respect of a police investigation into his or her conduct. Given that the police acquired the information contained in the letter of request pursuant to the exercise of legal power, they (and arguably anyone who obtained the letter knowing of the circumstances in which it was written) should not have allowed it to be used for any purpose other than investigating the respondent's conduct.

It is suggested then that Underhill L.J. was right to observe that the issues involved in *ZXC* are "not . . . entirely straightforward" (at [145]). The case provides welcome clarification about the limits of the rule that a person will generally have a reasonable expectation of privacy in respect of information about a police investigation into his or her conduct. The interplay between this rule and both defamation and breach of confidence does, however, warrant closer attention.

N. A. Moreham

Address for Correspondence: Faculty of Law, PO Box 600, Victoria University of Wellington, Wellington 6140, New Zealand.

REJECTING THE TRANSATLANTIC OUTSOURCING OF DATA PROTECTION IN THE FACE OF UNRESTRAINED SURVEILLANCE

IN Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* ("*Schrems II*") (EU:C:2020:559) the EU judicature was requested by the High Court of Ireland, to ascertain the validity of previous decisions for transfers of personal data by Facebook from the EU to the US under the Data Protection Directive (replaced by General Data Protection Regulation) and primary EU law, particularly provisions relating to respect for private life and the protection of personal data under Articles 7 and 8 of the EU Charter of Fundamental Rights ("EUCFR").

On 16 July 2020, the Grand Chamber of the Court of Justice of the European Union ("CJEU"), in a departure from the Advocate General's ("A.G.") Opinion (EU:C:2019:1145), invalidated the Privacy Shield for not affording "essentially equivalent" protection to that provided under the EU legal order for personal data transferred to the US. The court upheld the validity of the Standard Contractual Clauses for international data transfers, ruling that the National Data Protection Authorities ("DPAs") must take action where these clauses do not provide "essentially equivalent" protection to EU law. *Schrems II* is the second decision stemming from the long running challenge of Facebook Ireland's transfers of personal data to the US by privacy activist Maximillian Schrems. Following the Snowden revelations about mass surveillance programmes in 2013, Schrems lodged a complaint with the Irish Data Protection Commissioner